

Gurabo, Puerto Rico

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

FRANCISCO VEGA OTERO, INC.

Employer

and

SOLIDARIDAD GENERAL DE TRABAJADORES DE
PUERTO RICO

Petitioner

Case 24-RC-8322

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein the Act, a hearing was held on May 8, 9, 14 and 29 of 2003,¹ before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine whether a question concerning representation exists, and if so, to determine an appropriate unit for collective bargaining.² Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

¹By stipulation of the parties, the record includes the evidence presented at an earlier hearing between the same parties on November 25 and 26, 2002, in the matter of Francisco Vega Otero, Inc., Case 24-RC-8294, where the withdrawal of the petition was approved prior to closing of the hearing.

² Upon the entire record in this proceeding the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b. The parties stipulated, and I find, that the Employer, Francisco Vega Otero, Inc., is a Puerto Rico corporation with a place of business located in Gurabo, Puerto Rico, where it is engaged in the transportation of cargo. During the last twelve months, a representative period, the Employer purchased and received at its Gurabo, Puerto Rico facility, goods and materials valued in excess of \$50,000 directly

I. The Issue

The sole issue present in this case is whether the truck drivers sought to be represented by Petitioner are independent contractors or employees within the meaning of Section 2(3) of the Act.

II. Decision

After considering all of the evidence in the record,³ the applicable legal authorities, and the parties' briefs, I find that the truck drivers are employees. The reasons for this decision will be further discussed below. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:⁴

INCLUDED: All full-time and part-time truck drivers employed by the Employer at its place of business in Gurabo, Puerto Rico.

EXCLUDED: All other employees, clerical employees, guards and supervisors as defined in the Act.

The unit consists of approximately thirty (30) employees.

III. Statement of Facts

A Overview of the Employer's Operations

Since in or about 1980,⁵ Francisco Vega Otero, Inc. ("FVO") has provided trucking and related services to its clients pursuant to a permit issued by the Commonwealth of Puerto Rico Public Service Commission ("PSC"). At the time of the hearing, FVO engaged 30 truck drivers

from points located outside of the Commonwealth of Puerto Rico. Given these facts, the assertion of jurisdiction over the Employer herein is warranted.

c. The parties stipulated, and I find, that Petitioner, Solidaridad General de Trabajadores de Puerto Rico ("Petitioner or the Union"), is a labor organization within the meaning of Section 2(5) of the Act.

d. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³The Employer's "Motion in Opposition to the Receipt in Evidence of the Translations," filed on June 27, 2003 is granted.

⁴The parties stipulated at the hearing as to the appropriateness of the unit.

⁵Evidence was presented to indicate that FVO has operated a trucking business since at least the 1950s and that at some point it had a collective bargaining agreement with a union covering the truck drivers.

under a written agreement titled “Lease and Option to Buy Agreement,” that is signed with each driver (“the lease contract”). Except for the prices of the individual trucks, the lease contract contains identical terms and conditions for all the truck drivers.⁶

In addition to the truck drivers who hold a lease contract, FVO employs nine other individuals. Among these is Jesus Reboredo, the company’s president and only officer. FVO also employs a secretary, an accountant who is in charge of billing, a person who verifies the payment tickets, a salesperson, three dispatchers and a messenger.

FVO’s only business is the transportation of cargo for its clients. This cargo is carried inside separate containers, which are 48 to 53 feet long. The containers are totally separate from the trucks and can be attached and detached to the trucks as it becomes necessary. The trucks are used to carry and drop attached containers and other kinds of equipment. There is no loading or unloading of cargo performed at FVO’s facilities. FVO only transports the sealed containers as requested by the clients. The cargo may come from the continental U.S. or other countries and it is already loaded through the shipping companies into the containers.

FVO’s facility consists of the administrative offices and a six-acre yard where the truck drivers park their leased trailer trucks.⁷ The company keeps a diesel gas pump in the yard for use by the truck drivers. There is a room or specific area within the administrative offices where the truck drivers can await an assignment by the dispatcher. The room is air-conditioned and includes a TV and a washroom.

This arrangement ended in 1980 when the Commonwealth Public Service Commission approved a change in the contract between FVO and its truck drivers.

⁶The Lease Contract refers to the truck drivers as “the Lessee” at all times. For purposes of easier reference and understanding they shall be referred to herein as “truck drivers.”

⁷Although the company allows the truck drivers to take their leased trucks home, most truck drivers keep their trucks parked at the company’s facilities for convenience as well as security.

B. Regulatory Restrictions Applicable to FVO's Trucking Business

The business of in-land freight transportation is highly regulated in the Commonwealth of Puerto Rico, with the PSC establishing fixed rates and licensing requirements. Obtaining a permit from the PSC to operate as a freight service is a cumbersome and time-consuming process, requiring among other things, the filing of a petition for authorization supplemented by letters from three prospective clients as well as certificates from the Treasury Department and from an agency which monitors child support payments. The petition is published and a hearing is held to see if there is any objection to the granting of the permit or authorization. Once a permit is issued, the PSC requires that it be renewed every five years.

All persons or entities authorized to carry commercial cargo must separately register with the PSC each vehicle used for the transportation of cargo under the issued permit. For this purpose, the PSC keeps an exact record of each of the vehicles' licenses and registration with the Commonwealth Department of Transportation, thus specifically identifying each of the vehicles used by its licensees under any particular permit. The authorized person or entity must request permission from the PSC to add more vehicles to the permit, and also, it must inform the PSC about the sale of any of the vehicles identified in the permit and of its replacement with another vehicle, if applicable.

The PSC authorization to perform freight transportation is reflected in the vehicle's license plates obtained from the DOT. These license plates include a special code that identifies the vehicles as authorized to carry commercial cargo by the PSC. Also, the PSC requires that all of the vehicles included in the permit bear the authorization or permit number in a visible location in the doors of the truck, along with the name of the person or business entity holding the permit. The PSC's authorization or permit cannot be sold or leased. The authorized entity must file with the PSC copies of all the contracts and agreements that it executes in its transportation business.

C. The Lease and Option to Buy Agreement

1. Structure of the Work Relationship

Pursuant to the terms of the lease contract, FVO leases a PSC-registered truck to the driver, who in turn acquires the contractual right to use the truck to transport cargo containers for FVO's clients. The truck drivers are paid by FVO pursuant to FVO's pre-determined pay-rates and zones. Any particular transportation service for a FVO client is undertaken by the truck driver only if an FVO dispatcher offers it. The truck driver does not engage in any direct service or contract with any FVO client. In fact, the lease contract specifically prohibits the truck drivers from doing any business on their own with any FVO client.

During the duration of the lease contract, FVO retains exclusive title and ownership over the leased trucks. FVO is also the sole holder of the authorization and permits conferred by the PSC to operate a cargo transportation service, and each leased vehicle is individually registered under its permit. In addition, all applicable insurances are in FVO's name, as the titleholder of the trucks involved and the entity legally authorized to transport cargo.

The lease contract grants the truck drivers full use of the vehicles so long as they comply with all its terms and conditions. FVO contends that as the lease allows the truck drivers to take the trucks home, the truck drivers can thus obtain contracts with other clients using their leased trucks. The record, however, shows otherwise. The restrictions on freight transportation imposed by Puerto Rico along with the fact that the truck drivers are not the legal owners of the trucks, and do not have the insurance policies or PSC permits in their name nullifies the possibility for the truck drivers to engage in any independent entrepreneurial activity while they are working for FVO.

Petitioner's witness Carlos Sánchez testified that about two years ago he hauled freight on his own while using the FVO truck for a company called Central Roy, which was not an FVO client, and that he was paid directly by Central Roy. FVO authorized this use of the truck by Sánchez. Nevertheless, Sánchez's venture with Central Roy was short lived, for about two

weeks after it began, Central Roy found out that Sánchez did not have his own PSC permit, and it cancelled the contract. Central Roy claimed that it required the truck driver to have his own insurance and permits. After this, Sánchez has only been able to occasionally carry cargo for friends. The other witnesses' testimony was consistent with Sánchez's account, specifically, all other witnesses confirmed that without their own privately owned and licensed trucks, they are not able to pursue independent entrepreneurial activity for clients of their own using their trucks leased from FVO.⁸

Therefore, in spite of FVO's claims that it places no restrictions on the truck drivers' use of the trucks, and the lease contract's clause establishing that the truck drivers enjoy the complete use of the trucks, the fact remains that due to local restrictions, the truck that is leased from FVO can only be used to transport goods commercially pursuant to the PSC permit granted to FVO. The net effect of this is that the truck drivers are severely limited in their ability to haul commercial freight using the FVO-leased trucks and PSC permits granted to FVO.

2. The Purchase Option

All lease contracts contain a purchase option for the leased truck. This feature of the contract requires the truck driver to pay FVO a "rental" fee that is determined based on the truck's cost, plus interest. This fee is deducted by FVO directly from the drivers' weekly paycheck. At the end of the period pre-established in the lease, the truck driver will have paid the stipulated value of the truck, plus interest. The full payment of these pre-established amounts, gives the truck driver the right to exercise an option to purchase the leased truck for \$1.00.

The purchase option is not automatic. The option requires affirmative action from the truck driver, who must indicate that he wants to exercise the option. Unless the truck driver

⁸ However, those drivers that are able to lease more than one truck from FVO can make additional profit while hauling for FVO by hiring a driver to drive the other truck(s).

affirmatively exercises the purchase option, the lease contract is automatically renewed or extended on a yearly basis. Many truck drivers still work for FVO who, having paid all “rent” due to FVO, have not exercised the purchase option, and their lease contracts are still in effect. This is because once the option is exercised and the truck driver owns the truck outright, the contractual relationship with FVO is over and the working relationship between the truck driver and FVO is terminated as well. In addition, the purchased truck can no longer be used to move cargo, since it loses FVO’s license and permit to transport cargo commercially within Puerto Rico. According to regulations FVO must report the sale of the truck to the PSC and take the sold vehicle off its PSC permit. The lease requires that at the time the purchase option is exercised, the parties change the vehicle’s registration and license plate with the Department of Transportation and at that time, the license will be changed from a PSC-authorized license to indicate a private truck. That license plate does not allow the commercial in-land transportation of cargo within the Commonwealth of Puerto Rico. A truck with a private license is only authorized to transport cargo for personal and private use. Although the truck driver can eventually get his own PSC permit, he cannot work for FVO using his own truck.⁹ The record shows that FVO will only use drivers who lease trucks from FVO and work under a PSC permit granted to FVO.

3. Truck Driver Liabilities and Responsibilities

According to the lease contract, the truck driver is responsible for: (1) paying all maintenance expenses of the leased vehicle; (2) paying for any improvements, repairs and costs of the leased vehicle; (3) maintaining liability and property damage insurance policies for the leased unit covering FVO and the truck driver for at least \$2 million with a \$500,000 deductible; (4) any excess liability over the amounts of the policies.

⁹ The record showed that in the past some of the truck drivers exercised the purchase option with the intention of leasing a new truck to substitute the purchased truck. The acquisition of the new truck was

The truck driver also guarantees that it shall compensate FVO for the loss, damage, theft, conversion or destruction of the leased equipment in an amount equal to the assigned value to the vehicle in the agreement. Also, the truck driver agrees to pay any deductible amounts for damages to, or the loss of, freight vans, tanks or refrigerated units, as well as for the merchandise transported, if such damage or loss occurred while the equipment or merchandise was in the possession or under the control of the truck driver.

The contract provides that the parties are not entering into an employment agreement or partnership, and that the contract "is solely a lease agreement for the transportation units that are FVO's property." The truck driver agrees to pay his own social security expenses, driver's insurance, and any other insurance he may be required to have as an owner operator. The parties' intention is that the truck driver "shall be the owner operator of the units" the truck driver drives.

FVO in turn agrees to provide the truck drivers with all necessary permits including "the license issued by the Department of Transportation, inspections of the vehicle performed by the PSC and permits granted by the different maritime shipping companies in Puerto Rico." However, "[a]ll expenses incurred to obtain a license renewal stamp, the annual inspection of the vehicle by the Puerto Rico Department of Transportation" shall be paid by the truck driver.

"Breach of contract" by the truck driver is defined in the following manner:

- a. Failure to pay the rental fee;
- b. Failure to perform any clause or condition of the Agreement;
- c. The voluntary or involuntary filing of a bankruptcy petition;
- d. Failure to perform or violation of any of the covenants in the Agreement;
- e. Violation by the truck driver of any law, regulation or ordinance that affects the authorization or permits held by FVO;

financed by FVO, and thus, the driver and FVO entered into a new lease contract. However, in this situation the driver would only be able to use the leased truck to haul for FVO, not the truck he owned.

- f. Any conduct on the truck driver's part which may be harmful to FVO's good name.

The remedies provided for FVO by the contract, for the truck driver's violation of the above terms are, at its discretion:

- a. To terminate the agreement without prior notice and at truck driver's expense and transport the leased equipment to FVO's place of business;
- b. To repossess the leased equipment without terminating the agreement and charge truck driver the difference, if any, between the net amount received by FVO for the sale or lease of the leased equipment to a third party and the amount owed by truck driver from the time truck driver is in default and any additional amount or expense, including legal fees, that FVO may incur due to truck driver's breach of contract;
- c. To require payment of interest up to 8% per year in case of late payment by truck driver of any rental fees required by the agreement.

4. Working Conditions

The lease contract does not require the truck drivers to wear uniforms, and they in fact do not wear uniforms. There is no direct supervision established by the contract. The roads or specific routes to be used in the transportation of cargo are not established by FVO. There is no radio communication system with the drivers while they are on the road. There are no specific starting and quitting times or shifts. There are no disciplinary handbooks established for the truck drivers and they can fail to report to work without disciplinary consequences. Many risks faced by FVO for the truck drivers' incorrect performance of their work are by contract assigned to the truck drivers' liabilities.¹⁰

¹⁰For example, the lease contract holds FVO immune from liability for any injury suffered by any passenger in the trucks leased by the truck drivers. If FVO is obligated to pay any amounts, it shall be reimbursed by truck driver. There may be occasions when truck drivers have to call the dispatcher on their cell phones or receive phone calls from the dispatcher concerning special deliveries. FVO does not reimburse truck drivers for the expenses for these phone calls. Truck drivers are responsible for fixing any incorrect placement of equipment and any correction made by a third party is made at their expense, by the terms of the contract.

While no discipline or employee manual is established, the lease contract does require that the truck drivers behave towards FVO's clients, their employees, executives and functionaries and toward FVO's own employees, executives or functionaries "in a courteous and disciplined manner that shall uphold FVO's ... good name and orderly operations and the good services and functions of FVO's clients." In addition, "any aggressive behavior, whether physical or verbal, threat or insult or analogous conduct on the part of truck driver toward any of FVO's executives functionaries or employees and those of any of FVO's clients while truck driver is providing service to FVO's clients, shall constitute a violation" of the contract.

If a truck breaks down while making a delivery, the truck driver must inform FVO so that FVO can send another driver to complete the trip, even though FVO will only compensate the party who submits the collection documents. If a truck driver parks equipment belonging to a client incorrectly so that it could sink to the ground or be difficult to hook up, he will be responsible for fixing the situation. If the truck driver delivers equipment that is not in good condition, incorrect equipment, or equipment that cannot be loaded for any reason, he will not be paid for that trip, and he will be responsible to pick up or deliver the substitute equipment on his own account.

The truck driver is obligated to comply with all obligations and requirements imposed by the insurance companies covering the units that are FVO's property, as well as the merchandise being transported. The truck driver is also responsible for taking note of any defect or damage in the equipment or unit to be delivered and of informing it to FVO in a trustworthy manner. If he fails to do so, the truck driver shall be liable for any claim related to such damage. The truck driver shall not pick up any equipment unless such is in perfect working condition, any violation of that provision shall be at the truck driver's account.

If the truck driver encounters a problem with the equipment to be transported, during the course of a trip, it shall be solved by the truck driver, but it is governed by the terms of the agreements between FVO and its client, meaning that truck driver must act in compliance with

the terms of a specific agreement with a FVO client as instructed by FVO. For example, FVO requires that deliveries made to the seaport be delivered before a time certain, as that is a requirement of the shipyard or docks so that the ship can leave on time.

Some truck drivers regularly hire other drivers as their own employees, while other drivers do so occasionally.¹¹ This is done after notification to FVO. Also, the truck drivers may hire personal helpers. However, the lease contract clearly establishes that truck drivers may not transfer or sublet their truck units without FVO's consent.¹² This means that the lessee truck driver is still the responsible party for compliance with all terms of the lease contract.

5. Assignment of Work

FVO's gates open at 2:00 a.m. so that the truck drivers can write their name on a list in order of arrival. Assignments are made by the dispatcher, who reports to work at 6:00 a.m., at which time FVO begins assigning trips from the names off the list. If a truck driver is not on the premises at the time he is called, he loses the opportunity to get that trip. His name remains on the list for the next available trip.

Truck drivers can refuse to make a specific trip, without losing their priority on the list, meaning that they will be offered the next available trip.

6. Payment for Services

The lease contract incorporates a set of fixed rates for pre-established zones of delivery. These are the rates paid by FVO to the truck drivers for the trips made conforming to the lease

¹¹In those cases when truck drivers have hired other drivers to assign them to their trucks, truck drivers have independently set the terms and conditions of employment of any substitute truck driver or helper without FVO's intervention. Additionally, the record shows that daily, between two and five truck drivers assign somebody else to drive their leased truck. Occasionally, there may be more.

¹²The lease contract allows the truck driver to transfer his rights under the contract to a third party, with FVO's prior written consent. This is done through the execution of a separate contract titled Transfer of Rights. The transfer of rights includes the transfer of the FVO leased truck plus any rights conferred by the lease contract upon the driver. The transferee agrees to assume any and all obligations required under the lease contract being transferred. Any amounts paid by the purchaser or transferee to the truck driver, are exclusively negotiated between them. After such a transfer, the transferee becomes a FVO truck driver and thus, he substitutes the former truck driver in all rights and responsibilities. Any debt owed to FVO for the price of the truck is from then on assumed by the transferee.

contract. They may only be amended by FVO at its discretion when the PSC authorizes an increase in the rates. The pre-established zone rates include the most frequent destinations. FVO may, at its sole discretion, add zone rates to the ones already established in the agreement. The truck drivers cannot negotiate these rates, as they are exclusively established by FVO.

The drivers are paid by trip, not by an hourly rate, through a weekly check issued by FVO in the truck driver's name. The check is issued based on the timely presentation by the truck driver of a completed form supplied by FVO, along with all documents pertaining to the trips made such as invoices and bills of lading signed by the client, indicating that the client received the cargo in good condition. The forms required by FVO to be completed by the truck drivers for payment, individually identify each of the daily trips by destination and must be submitted daily, unless the driver is sick or otherwise does not show up.

7. Financing

According to the lease contract, the truck used to provide the services of cargo transportation is leased and owned by FVO. Until about four years ago, FVO financed the acquisition of these trucks by the drivers, and thus it charged "rent" and "interest" in the contracts. Subsequently, according to FVO President Jesús Reboredo, the Employer has stopped giving financing loans to the truck drivers for the acquisition or replacement of trucks. However, this change is not reflected in any way in the contracts, since all contracts are in terms of a lease, or adopt the terms of the lease contract. FVO does not recommend that financing be obtained from any particular source.

IV. Discussion

In *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968), the Supreme Court held that the common-law agency test is used to distinguish an employee from an independent contractor. This test requires that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* The following factors are considered:

- a. the extent of control which the master may exercise over the details of the work;
- b. whether or not the one employed is engaged in a distinct occupation or business;
- c. the kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
- d. the skill required in the particular occupation;
- e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- f. the length of time for which the person is employed;
- g. the method of payment, whether by the time or by the job;
- h. whether or not the work is a part of the regular business of the employer;
- i. whether or not the parties believe they are creating the relation of master and servant; and
- j. whether the principal is or is not in business.

When applying this analysis, the Board has rejected the argument that the predominant factor is the “‘right to control’ the manner and means of the work performed by the individual whose status is at issue.” *Slay Transp. Co., Inc.*, 331 NLRB 1292, 1294 (2000). Consequently, “all incidents of the relationship” are taken into account. *Id.*, see also *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998) (“[T]he common law agency test encompasses a careful examination of all factors and not just those that involve a right to control.”)

In *Roadway*, the Board applied these principles to a corporation operating a nationwide pickup and delivery system for small packages. The employer had argued that the truck drivers were independent contractors, considering that it did not: (1) require drivers to follow a uniform starting time; (2) maintain a fleet of vehicles for its drivers’ use; (3) maintain forms for the drivers to lease or purchase vehicles; (4) release terminated drivers from their financial obligations; (5) terminate drivers’ agreements at will and without cause; and (6) assign customer service areas without giving the drivers a proprietary interest in these areas. *Id.* at 843.

The Board found that in spite of the above facts, the truck drivers were employees within the meaning of the Act because:

[T]he drivers ... d[id] not operate independent businesses, but perform[ed] functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they d[id] business in the company's name with assistance and guidance from it; they d[id] not ordinarily engage in outside business; they constitute[d] an integral part of the company's business under its substantial control; they ha[d] no substantial proprietary interest beyond their investment in their trucks; and they ha[d] no significant entrepreneurial opportunity for gain or loss. *Id.* at 851.

It was also noted that the drivers did business in the name of Roadway, providing services that constituted a regular and essential part of the company's business operations, a factor considered in favor of an employment status. *Roadway*, 326 NLRB at 851. The vehicles used were custom designed and bore the name of Roadway and the company logo, thus making their integration into Roadway highly visible and well publicized. *Id.* Although in theory the drivers could use their trucks for other entrepreneurial pursuits of their own, in practice none of the drivers had used their trucks for independent and separate customers because of the many obstacles created by their relationship with Roadway, among them a prohibition from using the truck for purposes other than servicing Roadway during the day, and requiring it to be at its facilities very early in the morning for the loading of cargo by Roadway personnel. *Id.* The Board also noted that in requiring ownership over the trucks by the truck drivers, Roadway had "simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Id.*

Applying these standards to the current case, I find that the facts presented here, support the conclusion that the drivers are statutory employees rather than independent contractors. Thus, FVO maintains title to the trucks during the entire time that the drivers haul for FVO. In fact, as soon as the driver exercises the option to buy the truck, he can no longer drive for FVO. FVO will only work with drivers who lease trucks from the company and who work under a PSC permit given to FVO and not with drivers who own their own trucks and who

have their own PSC permit. As noted previously, the PSC permit is essential in order to carry freight commercially in Puerto Rico. Also the FVO drivers are barred by the lease contract from doing business on their own with any of FVO's clients. Although FVO does not provide uniforms, a radio communication service, maintenance services at its facilities, or services discounts, it does provide the truck, the applicable permits, licenses and authorizations to be able to perform that service. In this case, all of these instruments of the job belong exclusively to FVO during the duration of the lease contract. Significantly, many of the trucks used by FVO's truck drivers were actually acquired through financing provided by FVO, and at all times FVO remained the legal owner of these trucks during the lease contract. FVO also participates in the inspection and maintenance of all its leased trucks, since it is the rightful owner, and it is required to provide the truck drivers with all necessary documents to carry out the required inspections and maintenance of the trucks. Even when the truck drivers are required to reimburse or pay for these inspections and maintenance, the fact remains that FVO participated in the process of inspecting and complying with the legal requirements. Also, all applicable insurances are in FVO's name, as the titleholder of the trucks involved and the entity legally authorized to transport cargo, even though each truck driver pays for his share of the insurance policy payment, and even though each driver is covered by the same insurance policy.

In addition, FVO is in the business of providing commercial services of cargo transportation, precisely the activity that it has contracted the truck drivers to do. All of FVO's other employees complement the truck drivers' work. The FVO truck drivers are required to bear the company's name and license number on each of the truck's doors, and most, if not all of them, also use the company logo.

In *United Ins. Co., Inc.*, 390 U.S. at 259-260, the Supreme Court noted, among the "decisive factors" for finding that a group of insurance agents were employees, that they "d[id] not operate their own independent businesses, but perform[ed] functions that [we]re an essential part of the company's normal operations." Also, the Court noted that the agents "d[id]

business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies." *Id.* This was also the case in *Roadway*, 326 NLRB at 851, and it is the case here, where FVO' truck drivers do not operate their own businesses, but work for FVO, do business in the company's name, and, ordinarily work only for FVO under the lease contracts.

Although FVO has structured its business relationship with the truck drivers in a manner that allocates to them the burden for maintenance and upkeep of the trucks, and in spite of the fact that it has retained little control over many of the day-to-day performance of the work, the facts clearly show that FVO has vested the truck drivers with little, if any, entrepreneurial opportunities, a key component of independent contractor status.

V. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Solidaridad General de Trabajadores de Puerto Rico**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for

cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *North Macon Health Care Facility*, 315 NLRB, 359, 361 (1994); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, such list must be received in the NLRB Region 24 Regional Office, La Torre de Plaza Suite 1002, 525 F.D. Roosevelt Ave., San Juan, Puerto Rico 00918-1002, on or before **December 16, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (787) 766-5478. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to the Election provided by the Board in areas conspicuous to potential voters for a minimum of **three** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least **five** full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so stops the employers from filing objections based on nonposting of the election notice.

VII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by **December 23, 2003**.

Dated at San Juan, Puerto Rico, this 9th day of December 2003.



Marta M. Figueroa
Regional Director, Region 24
National Labor Relations Board
Region 24
La Torre de Plaza, Suite 1002
525 F.D. Roosevelt Avenue
Hato Rey, Puerto Rico 00918-1002
E-mail: region24@nrlrb.gov

177-2484-5000